IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 2053 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

NATWARLAL RATILAL PAREKH

Versus

RAJUBHAI DURLABHBHAI

Appearance:

Ms Kalpana Brahmbhatt for Ms.VASUBEN P SHAH for Petitioner

Mr.NAGARKAR for MR SN SHELAT for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 10/08/98

ORAL JUDGEMENT

1. This is tenant's revision under Section 29(2) of the Bombay Rent Act, 1947.

2. Brief facts are that the disputed premises was let out by the respondent to the revisionist on monthly rent of Rs.50/-. It was alleged that the revisionist did not pay any rent since 1.5.1975 and 34 months' rent fell due. Thereafter notice of demand was issued. The said notice remained uncomplied. Hence the Suit for eviction, recovery of arrears of rent and mesne profits was filed.

3. The Suit was resisted by the revisionist on the ground that the rate of rent was previously Rs.30/- per

month which was enhanced to Rs.40/- p.m. and since 1977 it was raised Rs.50/- p.m. He pleaded that the rent up-to-date was paid but no receipt was issued by the plaintiff - respondent. He showed his readiness and willingness to pay the rent.

4. The trial Court found that the notice was refused by the revisionist which amounted to sufficient service of notice and since this notice remained uncomplied with and further because the revisionist was in arrears of rent for 34 months on the date of service of notice the case was covered under Section 12(3)(a) of the Rent Act and the tenant was not entitled to the benefit of Section 12(3)(b) of the Rent Act. The suit was accordingly decreed.

5. Appeal was preferred which was dismissed, hence this revision.

6. Only two points were urged by the learned Counsel for the revisionist. The first was that the notice of demand was not duly served. Hence, suit for eviction could not be decreed. The second point urged was that the case does not fall under Section 12(3)(a) of the Act; rather it falls within the ambit of Section 12(3)(b) of the Rent Act.

7. Coming to the first point it is found from the record that the plaint and written statement regarding manner of service of notice are silent and vague. In Para : 2 of the plaint only this much is mentioned that notice was sent which was not complied with. In plaint it is not specifically mentioned that the notice was refused by the tenant revisionist. Likewise the tenant revisionist in his written statement has also not specifically denied that the notice was not refused by him. Registered envelope in which notice was sent and which was returned to the plaintiff landlord with postal endorsement of refusal was filed along with the plaint at the time of institution of the Suit. The fact, therefore, remains that the plaint is silent whether the notice was personally served on the tenant or it was refused by him. It has been contended that this silence has greatly prejudiced the tenant. I, however, do not feel that by such omission in the pleading the tenant was really prejudiced in any manner. It is true that the plaint is not happily and properly drafted. The question for consideration is whether such drafting of plaint will be a ground for holding that the notice was not refused. The mistake of the counsel in not properly drafting the plaint cannot be a ground for drawing adverse inference

against the plaintiff landlord nor it can be a ground for prohibiting the landlord from adducing evidence regarding the mode of service of notice. It was not a malafide intention of the landlord to suppress the refused envelope. On the other hand he handed it over to his Counsel and the counsel filed the same along with the plaint at the time of institution of the Suit. It was also not a case where the envelope was opened before filing of the Suit. On the other hand, the envelope was intact bearing postal endorsement of refusal and the said envelope was opened only when the evidence of the plaintiff was being recorded. The plaintiff in his statement has stated that the notice was refused by the revisionist. When the turn of the revisionist came, he, in the witness box stated, that he was out of station in connection with his work. This version was found to be an after-thought by the trial Court. The Appellate Court found that the contention before it was that the tenant was at his sister's place when the notice was allegedly tendered. The lower Appellate Court disbelieved this contention also for the obvious reason that the sister of the revisionist was not examined to support the defendant revisionist that on the relevant date he was at her house.

8. Thus, so far as the pleadings are concerned there is no specific averment in the plaint that the notice was refused nor is there any specific denial in the written statement that the notice was not refused. The defendant revisionist had an opportunity to inspect the record before filing the written statement. If the record would have been inspected he could have found the notice annexed with the plaint. Be that it may, in the circumstances of the case it cannot be said that for want of specific averment in the plaint that the notice was refused no evidence can be permitted to be adduced by the landlord. The evidence was already adduced by filing the envelope. The landlord proposed to rely upon presumption of service by refusal. He did not rely upon any direct evidence of refusal of notice.

9. The next question, therefore, is that if no adverse inference from pleading is to be drawn whether on the material on record notice was found to have been refused and whether the presumption of service by refusal can legally be drawn on the evidence available on record.

10. The postal envelope was sent at the correct address of the revisionist through registered A.D.post There is no dispute that it was sent at the incorrect address of the defendant - revisionist. If a registered

notice at the correct address is sent by the landlord, presumption can abe drawn under Section 27 of the General Clauses Act that in normal course it reached the addressee.

11. The next stage is what presumption is to be drawn thereafter viz. whether the addressee accepted the notice or he refused to accept the notice. It is nobody's case that notice was served personally on the tenant. On the other hand the landlord stated in the witness box that the notice was refused. His statement found corroboration from the postal endorsement of refusal. Reliance was placed by the landlord upon the postal endorsement of refusal and he did not rely upon further proof of refusal. He could have legally relied upon the presumption available to him.

12. The next presumption is that the notice was refused because it was returned with postal endorsement of refusal. This inference and presumption can be drawn underSection 114 of the Evidence Act. Such presumption is not conclusive but it is always rebuttable. The tenant can rebut the presumption of refusal. In the written statement he has not stated that he did not refuse to accept the notice. In the witness box he stated that the notice was not refused by him. He further stated that at the relevant time he was out of station in connection with his treatment. This was a fact in special knowledge of the tenant and he could have produced evidence by filing medical certificates, medical prescriptions to show that on the relevant date he was out of station and was under treatment. No such evidence was adduced by the tenant. He also did not examine the person with whom he was staying out-side the place where the disputed premises is situated.

13. It is, therefore, a case of bare denial of the tenant that the notice was not refused by him. The law on the point has now settled that bare denial of the tenant is no rebuttal of presumption of service by refusal. The tenant has to allege and establish special circumstances to rebut this presumption. The landlord was not obliged to examine the postman because he chose to rely upon presumption of refusal. The two Courts below rightly found that the stand of the tenant was an after-thought and was not supported by any reliable evidence that he was out of station or he was at his sister's house where he was under-going treatment on the relevant date. Thus, whatever belated special circumstance was set up by the tenant was disbelieved by the two courts below. This is a concurrent finding of

fact recorded by the two courts below which cannot be called perverse. Hence, the High Court in revision will be reluctant in interfering with such finding.

14. If special circumstance pleaded by the tenant was disbelieved by the two courts below then bare denial by the tenant can not rebut the presumption of service by refusal. There was thus no occasion for shifting the onus of proof upon the landlord to examine the postman to prove the endorsement of refusal as it was sufficient and valid service of notice of demand within the meaning of Section 12(2) of the Rent Act read with Section 106 of the Transfer of Property Act.

15. The next question is whether Section 12(3)(a) is applicable to the facts of the case or not. The two Courts below found from the evidence on record that 34 months rent was due when the notice of demand was refused by the tenant. The defendant pleaded that the entire rent was paid. Hoswever, this pleading and evidence of the defendant was not accepted by the two courts below for cogent reasons. No interference on this finding is also required inasmuch as the question of payment of rent by the tenant is a pure question of fact which has been determined by the two courts below by their concurrent findings. If the payment of rent set up by the tenant is disbelieved then it goes to show that he was in arrears of rent for 34 months which exceeded six months rent on the date of service of notice by refusal. No reply to the notice was given by the tenant. No payment of rent was made within a month of service by refusal of notice. It was a case of monthly tenancy. The rent was payable monthly. No dispute regarding standard rent was raised within a period of one month of service of notice. Such belated dispute was raised in the written statement which was not found to be bonafide dispute of standard rent by the two courts below. Consequently Section 12(3)(a) was rightly applied by the two courts below. If Section 12(3)(a) applied, the Courts below had no option but to decree the Suit for eviction. The lower appellate Court has also considered in alternative the defence plea that the the case is governed by Section 12(3)(b) of the Act. The lower Appellate Court observed from the material on record that after service of notice no rent was paid by the revisionist. It further observed that during the pendency of the trial nothing was paid by the tenant nor any amount was deposited in the trial Court. At the time of filing of appeal also nothing was deposited and after lapse of 17 months a sum of Rs.4000/- only was deposited in apeal. In these circumstances the lower Appellate Court was perfectly justified in holding that Section 12(3)(b) of the Rent Act was not applicable and the tenant was not entitled to the statutory protection under

Section 12(3)(b) of the Act.

16. In the result the Revision is devoid of merit and is liable to be dismissed. The Revision is accordingly dismissed. Parties shall bear their own costs.

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sas sd/-

(D.C.Srivastava,J.)